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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 TROY RUTAR,

8 Plaintiff,

9 v.

10 COMMISSIONER OF SOCIAL
11 SECURITY,

12 Defendant.

NO: 1:16-CV-3054-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

13 BEFORE THE COURT are the parties' cross motions for summary
14 judgment. ECF Nos. 15, 16. D. James Tree represents Plaintiff. Michael Tunick
15 represents Defendant. The Court has reviewed the administrative record and the
16 parties' completed briefing and is fully informed. For the reasons discussed below,
17 the Court grants Defendant's motion and denies Plaintiff's motion.

18 **JURISDICTION**

19 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g).
20

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is limited: the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012) (quotation and citation omitted). "Substantial evidence" means relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether this standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) (citation omitted). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id.* An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination." *Id.* at 1115 (quotation and citation

1 omitted). The party appealing the ALJ's decision generally bears the burden of
2 establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

3 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

4 A claimant must satisfy two conditions to be considered "disabled" within
5 the meaning of the Social Security Act. First, the claimant must be "unable to
6 engage in any substantial gainful activity by reason of any medically determinable
7 physical or mental impairment which can be expected to result in death or which
8 has lasted or can be expected to last for a continuous period of not less than twelve
9 months." 42 U.S.C. § 423(d)(1)(A). Second, the claimant's impairment must be
10 "of such severity that he is not only unable to do his previous work[,] but cannot,
11 considering his age, education, and work experience, engage in any other kind of
12 substantial gainful work which exists in the national economy." 42 U.S.C. §
13 423(d)(2)(A).

14 The Commissioner has established a five-step sequential analysis to
15 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
16 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's
17 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in
18 "substantial gainful activity," the Commissioner must find that the claimant is not
19 disabled. 20 C.F.R. § 404.1520(b).

1 If the claimant is not engaged in substantial gainful activities, the analysis
2 proceeds to step two. At this step, the Commissioner considers the severity of the
3 claimant's impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers
4 from "any impairment or combination of impairments which significantly limits
5 [his or her] physical or mental ability to do basic work activities," the analysis
6 proceeds to step three. 20 C.F.R. § 404.1520(c). If the claimant's impairment
7 does not satisfy this severity threshold, however, the Commissioner must find that
8 the claimant is not disabled. *Id.*

9 At step three, the Commissioner compares the claimant's impairment to
10 several impairments recognized by the Commissioner to be so severe as to
11 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §
12 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the
13 enumerated impairments, the Commissioner must find the claimant disabled and
14 award benefits. 20 C.F.R. § 404.1520(d).

15 If the severity of the claimant's impairment does meet or exceed the severity
16 of the enumerated impairments, the Commissioner must pause to assess the
17 claimant's "residual functional capacity." Residual functional capacity ("RFC"),
18 defined generally as the claimant's ability to perform physical and mental work
19 activities on a sustained basis despite his or her limitations (20 C.F.R. §
20 404.1545(a)(1)), is relevant to both the fourth and fifth steps of the analysis.

1 At step four, the Commissioner considers whether, in view of the claimant's
2 RFC, the claimant is capable of performing work that he or she has performed in
3 the past ("past relevant work"). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is
4 capable of performing past relevant work, the Commissioner must find that the
5 claimant is not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of
6 performing such work, the analysis proceeds to step five.

7 At step five, the Commissioner considers whether, in view of the claimant's
8 RFC, the claimant is capable of performing other work in the national economy.
9 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner
10 must also consider vocational factors such as the claimant's age, education and
11 work experience. *Id.* If the claimant is capable of adjusting to other work, the
12 Commissioner must find that the claimant is not disabled. 20 C.F.R. §
13 404.1520(g)(1). If the claimant is not capable of adjusting to other work, the
14 analysis concludes with a finding that the claimant is disabled and is therefore
15 entitled to benefits. *Id.*

16 The claimant bears the burden of proof at steps one through four above.
17 *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009). If the
18 analysis proceeds to step five, the burden shifts to the Commissioner to establish
19 that (1) the claimant is capable of performing other work; and (2) such work
20 "exists in significant numbers in the national economy." 20 C.F.R. § 404.1560(c);

1 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

2 **ALJ’S FINDINGS**

3 On September 28, 2012, Plaintiff Troy Antonio Rutar concurrently applied
4 for disability insurance benefits and supplemental security income, and alleged an
5 onset date of October 1, 2009. *See* Tr. 176-79; 191-93. Plaintiff asserted that he
6 had not been able to work due to fibromyalgia, hepatitis C, and degenerative disc
7 disease. Tr. 23-24; 60. He was last insured for disability insurance benefits on
8 December 31, 2011, and had previously worked as a ranch hand, casino dealer,
9 cabinet assembler, and landscape laborer. *See* Tr. 23; 25; 28; 61; 196; 211.

10 Plaintiff’s claim for disability insurance benefits was denied both initially
11 and upon reconsideration. Tr. 60; 62-79; 80-90. On reconsideration of Plaintiff’s
12 supplemental security income claim, state agency medical consultant Charles
13 Wolfe, M.D. opined that Plaintiff became disabled as of December 4, 2012 based
14 on his age and by application of the Medical–Vocational Rule 201.10. *See* Tr. 80-
15 90; 92. Plaintiff was awarded supplemental security income benefits as of
16 December 2012. Tr. 21; 23; 28-29.

17 Thereafter, a disability insurance benefits hearing was held on July 15, 2014,
18 before an Administrative Law Judge (“ALJ”). Tr. 34; 128-29. At step one, the
19 ALJ determined that Plaintiff had not engaged in substantial gainful activity from
20 his alleged onset date of October 1, 2009, through the date he was last insured,

1 December 31, 2011. Tr. 23. At step two, the ALJ determined that Plaintiff had a
2 severe impairment of degenerative disc disease (“DDD”) of the lumbar and
3 cervical spine. Tr. 23. The ALJ also found that although Plaintiff was diagnosed
4 with hepatitis C, it did not cause more than minimal functional limitations. Tr. 24.
5 Similarly, although treatment notes suggest fibromyalgia, the ALJ found that it is a
6 non-severe impairment. Tr. 24. At step three, the ALJ determined that Plaintiff’s
7 DDD did not meet or medically equal a listed impairment. Tr. 24-25.

8 At step four, the ALJ performed a residual functional capacity (“RFC”)
9 analysis. Tr. 25-28. Based on the RFC finding, at step 5, the ALJ found that
10 although Plaintiff was unable to perform any past relevant work, he could perform
11 work existing in significant numbers in the national economy such as a cashier II,
12 assembler, and semi-conductor assembler. Tr. 27-29; 55.

13 On September 23, 2014, Plaintiff appealed the denial of disability insurance
14 benefits to the Social Security Appeals Council (Tr. 17), which denied review (Tr.
15 1-4), making the ALJ’s decision the final decision of the Commissioner. *See* 20
16 C.F.R. § 404.981.

17 ISSUES

18 Plaintiff seeks judicial review of the Commissioner’s final decision denying
19 his disability insurance benefits under Title II of the Social Security Act. Plaintiff
20 raises four issues for review:

1 A “claimant has the burden of proving that he became disabled prior to the
2 expiration of his disability insured status.” *Macri v. Chater*, 93 F.3d 540, 543 (9th
3 Cir. 1996) (citing *Flaten v. Secretary of Health & Human Serv.*, 44 F.3d 1453,
4 1457 (9th Cir. 1995)). Pursuant to SSR 83-20, an ALJ must seek medical expert
5 testimony to determine the onset date only when the “medical evidence is not
6 definite” and “medical inferences” are necessary. *Armstrong v. Comm’r of Soc.*
7 *Sec. Admin.*, 160 F.3d 587, 590 (9th Cir. 1998). However, SSR 83–20 does not
8 free the claimant from his or her burden to prove disability within the meaning of
9 the Social Security Act. *See* 42 U.S.C. § 423(d)(5); 20 C.F.R. § 404.1520; SR 83-
10 20.

11 A determination of disability inexorably precedes a determination of the
12 onset date. *See Sam v. Astrue*, 550 F.3d 808, 809-10 (9th Cir. 2008) (holding that
13 “SSR 83–20 does not require a medical expert where the ALJ explicitly finds that
14 the claimant has never been disabled”); *see also Brinegar v. Astrue*, 337 F. App’x
15 711, 712 (9th Cir. 2009) (holding that because the ALJ found the claimant “was
16 not disabled . . . at any time through the date of this decision,” the ALJ was not
17 required to use a medical expert).

18 The ALJ found Plaintiff “was not under a disability, as defined in the Social
19 Security Act, *at any time* from October 1, 2009, the alleged onset date, through
20 December 31, 2011, the date last insured (20 CFR 404.1520(g)).” Tr. 29

1 (emphasis added). Plaintiff acknowledges that he was found to be disabled for
2 supplemental security income benefits beginning in December 2012, because Dr.
3 Wolfe recognized additional adversities supporting application of the advanced age
4 category, as he was on the borderline of that age category. ECF No. 17 at 7; Tr.
5 88-89. Because application of the grids caused Plaintiff to be declared disabled,
6 the ALJ did not err when he did not seek another medical expert in addition to Dr.
7 Wolfe's analysis.

8 **B. Adverse Credibility Determination**

9 Plaintiff contends that the ALJ improperly discounted his subjective
10 complaints and failed to provide clear and convincing reasons for doing so. ECF
11 No. 15 at 17-20. Defendant argues that the ALJ found Plaintiff not credible
12 because Plaintiff misrepresented his drug use, his complaints were inconsistent
13 with the objective and physical examination findings, and his activities were not as
14 limited as the ALJ would expect. ECF No. 16 at 6.

15 In the event an ALJ finds a claimant's subjective assessment unreliable, "the
16 ALJ must determine whether the claimant has presented objective medical
17 evidence of an underlying impairment which could reasonably be expected to
18 produce the pain or other symptoms alleged." *Garrison v. Colvin*, 759 F.3d 995,
19 1014 (9th Cir. 2014) (internal quotation marks and citation omitted). In making
20 such determination, the ALJ may consider, *inter alia*: (1) the claimant's reputation

1 for truthfulness; (2) inconsistencies in the claimant's testimony or between his
2 testimony and his conduct; (3) the claimant's daily living activities; (4) the
3 claimant's work record; and (5) testimony from physicians or third parties
4 concerning the nature, severity, and effect of the claimant's condition. *See Thomas*
5 *v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002). If there is no evidence of
6 malingering, the ALJ's reasons for discrediting the claimant's testimony must be
7 "specific, clear and convincing." *Garrison*, 759 F.3d at 1014-15 (quotation and
8 citation omitted). The ALJ "must specifically identify the testimony she or he
9 finds not to be credible and must explain what evidence undermines the
10 testimony." *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001).

11 Here, the Court finds that the ALJ provided specific, clear, and convincing
12 reasoning supported by substantial evidence for finding Plaintiff's testimony about
13 the intensity, persistence, and limiting effects of his symptoms not "entirely
14 credible." Tr. 24-27; *Garrison*, 759 F.3d at 1014-15. First, there is no evidence of
15 malingering in this case. *See* Tr. 23-29. Rather, the ALJ found that Plaintiff's
16 "pain complaints exceed objective and physical exam findings." Tr. 26.
17 Specifically, the ALJ noted multiple evaluations finding Plaintiff to be "in no acute
18 distress," "ambulatory with a normal gait," able to "walk without difficulty,"
19 exhibiting a "good range of motion," with "no vertebral tenderness," and capable
20 of a "negative straight leg test raise." Tr. 23, 26 (citing Tr. 275, 279, 335, 365).

1 Despite Plaintiff's testimony complaining of disabling back and neck pain, the ALJ
2 noted that an MRI of the lumbar spine in April 2010 was "unremarkable." Tr. 26
3 (citing Tr. 388). Moreover, the ALJ found that

4 physical exam findings were mild or within normal limits. On physical
5 examination in April 2010, the claimants had 5/5 muscle strength of the
6 upper extremities and 4/5 strength of the lower extremities. He had
7 tenderness to palpation at T10-L4. However, he had a normal gait and
8 station. He was able to get up and down from the exam table without
9 difficulty.

10 Tr. 26 (citing Tr. 286, 335). The ALJ also noted that during an exam in January
11 2011, Plaintiff appeared comfortable and "was able to walk without difficulties and
12 sit in the exam room comfortably." *Id.* (citing Tr. 279).

13 The inconsistencies between Plaintiff's reported difficulties lifting,
14 squatting, bending, standing, reaching, walking, sitting, kneeling, and stair
15 climbing, *see* Tr. 23, and the medical evidence provide a permissible reason for
16 discounting Plaintiff's credibility. *See Thomas*, 278 F.3d at 958-59 ("[t]he ALJ
17 may consider . . . testimony from physicians and third parties concerning the
18 nature, severity and effect of the symptoms of which the claimant complains.")
19 (internal citations and modifications omitted); *see also Rollins v. Massanari*, 261
20 F.3d 853, 857 (9th Cir. 2001) ("While subjective pain testimony cannot be rejected
on the sole ground that it is not fully corroborated by objective medical evidence,
the medical evidence is still a relevant factor in determining the severity of the

1 claimant's pain and its disabling effects.") (citation omitted).

2 The ALJ reasoned that Plaintiff's frequent misrepresentations about his drug
3 use or drug history undermine Plaintiff's credibility. Tr. 26. The ALJ noted:

4 For example, in March 2010, [Plaintiff] denied any use of illegal drugs other
5 than smoking marijuana on occasion (Exhibit 5F at page at page 27). The
6 following month, Amber Figueroa, DO noted that she saw [Plaintiff] back in
7 July and he had a positive drug screen for cocaine at that time (Exhibit 5F at
8 page 22). In August 2010, [Plaintiff] denied any history of illicit drug use
9 (Exhibit 5F at page 19). In January 2011, [Plaintiff] reported that he was not
10 doing any illegal drugs. He reported that he used to do marijuana in the past
11 (Exhibit 5F at page 15). In April 2011, after Dr. Goshike refused to
12 prescribe narcotic medication, [Plaintiff] disclosed that he would try other
13 means of getting illicit drugs. He admitted that he had to get illegal drugs in
14 the past such as marijuana when he did not have a medical coupon or
15 finances to afford medication (Exhibit 5F at page 11).

16 Tr. 26-27 (citing Tr. 275, 279, 283, 286, 291). The ALJ's consideration of
17 Plaintiff's truthfulness in assessing his credibility is another permissible reason in
18 support of the ALJ's negative credibility determination. *See Thomas*, 278 F.3d at
19 958.

20 In sum, having thoroughly reviewed the record, the Court concludes that the
ALJ provided several specific, clear, and convincing reasons for discounting
Plaintiff's testimony. *See Garrison*, 759 F.3d at 1014-15. The ALJ did not err in
making an adverse credibility determination.

19 **C. Opinion Evidence**

20 Next, Plaintiff faults the ALJ for improperly discounting the opinions of

1 Amber Figueroa, D.O. and Deepika Goshike, M.D., disregarding the opinions of
2 Mark Maiocco, M.D. and Sarah Garrison, ARNP, and giving too much weight to
3 the opinion of Wayne Hurley, M.D.. *See* ECF No. 15 at 9-16. Plaintiff argues that
4 had the ALJ adequately weighed the evidence, the opinions would have compelled
5 a finding of disability and, therefore, the Court should reverse and remand for an
6 immediate award of benefits. *Id.* at 16.

7 There are three types of physicians: “(1) those who treat the claimant
8 (treating physicians); (2) those who examine but do not treat the claimant
9 (examining physicians); and (3) those who neither examine nor treat the claimant
10 but who review the claimant’s file (nonexamining or reviewing physicians).”
11 *Holohan*, 246 F.3d at 1201-02 (brackets omitted). “Generally, a treating
12 physician’s opinion carries more weight than an examining physician’s, and an
13 examining physician’s opinion carries more weight than a reviewing physician’s.”
14 *Id.* “In addition, the regulations give more weight to opinions that are explained
15 than to those that are not, and to the opinions of specialists concerning matters
16 relating to their specialty over that of nonspecialists.” *Id.* (citations omitted).

17 If a treating or examining physician’s opinion is uncontradicted, an ALJ may
18 reject it only by offering “clear and convincing reasons that are supported by
19 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
20 “However, the ALJ need not accept the opinion of any physician, including a

1 treating physician, if that opinion is brief, conclusory, and inadequately supported
2 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
3 (9th Cir. 2009) (internal quotation marks and brackets omitted). Although the
4 contrary opinion of a non-examining medical expert does not alone constitute a
5 specific, legitimate reason for rejecting a treating or examining physician’s
6 opinion, it may constitute substantial evidence when it is consistent with other
7 independent evidence in the record. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149
8 (9th Cir. 2001) (citing *Magallanes v. Bowen*, 881 F.2d 747, 752 (9th Cir. 1989).

9 **a. *Amber Figueroa, D.O.***

10 Plaintiff argues that it is error for the ALJ to accord little weight to Dr.
11 Figueroa’s opinion simply because it does not comport with objective medical
12 evidence. ECF No. 15 at 10-11 (citing *Rollins v. Massanaro*, 261 F.3d 853, 856-
13 57 (9th Cir. 2001).

14 The ALJ noted that Dr. Figueroa opined that Plaintiff was severely limited in
15 his ability to work. Tr. 27 (citing Tr. 334-37). However, the ALJ gave Dr.
16 Figueroa’s opinion little weight because “it is inconsistent with objective and
17 physical exam findings.” *Id.* The ALJ reasoned that during an examination,
18 Plaintiff had 5/5 strength of the upper extremities and 4/5 strength of the lower
19 extremities, and normal gait and station. *Id.* The ALJ found that Dr. Figueroa’s
20 opinion that Plaintiff was severely limited in his ability to work is inconsistent with

1 his noted strength and physical abilities. *Id.* The Court finds that the ALJ's
2 reasoning is supported by the evidence. *See* Tr. 335.

3 Plaintiff's reliance on *Rollins* is inapposite. *Rollins*, 261 F.3d at 856. The
4 ALJ's findings in *Rollins* were inconsistent with "the sort of description and
5 recommendations one would expect to accompany a finding that Rollins was
6 totally disabled under the Act." *Id.* The same applies here. The ALJ determined
7 that the description of Plaintiff's physical strength and evaluation of his gait and
8 station were inconsistent with Dr. Figueroa's severely limited assessment. Tr. 27.

9 The Court concludes that the ALJ provided sufficient reasoning for giving
10 Dr. Figueroa's opinion little weight because contradictions between her treatment
11 notes and her ultimate conclusion is a legitimate, clear and convincing reason for
12 limiting Dr. Figueroa's opinion. *Bayliss*, 427 F.3d at 1216; *see also* *Tonapetyan*,
13 242 F.3d at 1149 ("When confronted with conflicting medical opinions, an ALJ
14 need not accept a treating physician's opinion that is conclusory and brief and
15 unsupported by clinical findings."). The ALJ did not err in limiting the weight
16 given to Dr. Figueroa's opinion.

17 **b. *Deepika Goshike, M.D.***

18 Plaintiff also faults the ALJ for discounting the opinion of Dr. Goshike,
19 Plaintiff's treating physician. ECF No. 15 at 11-12. The ALJ gave "little weight"
20

1 to Dr. Goshike’s opinion, finding that her opinion is not supported by the record as
2 a whole for two reasons. Tr. 27.

3 First, the ALJ found that in January 2011 Dr. Goshike “opined that
4 [Plaintiff] could sit for 3 hours in an 8-hour workday.” Tr. 27 (citing Tr. 329-30).
5 Dr. Goshike also opined that Plaintiff “could stand for 3 hours in an 8-hour
6 workday” and “lift up to 25 pounds occasionally and 10 pounds frequently.” *Id.*
7 However, the ALJ found that Dr. Goshike’s opinion is “inconsistent with exam
8 findings that same month during which [Plaintiff] looked comfortable” and “was
9 able to walk without difficulties and sit in the exam room comfortably.” *Id.* (citing
10 Tr. 279). The ALJ noted that Dr. Goshike also determined that Plaintiff had “good
11 range of motion and no weakness on examination” a few months later in April
12 2011. *Id.* (citing Tr. 275).

13 Second, the ALJ assigned little weight to Dr. Goshike’s “subsequent
14 opinions in March 2012 where she indicated that [Plaintiff] could perform
15 essentially light work and July 2012 where [it is] indicated that [Plaintiff] could
16 perform sedentary and later opinion that same month of light work.” *Id.* (citing Tr.
17 315-16, 318-19, 323-24). The ALJ reasoned that these opinions are well after the
18 date late insured. *Id.*

19 It is well settled that the ALJ may discount an opinion that is unsupported by
20 the record as a whole or by clinical findings. *See Batson v. Comm’r of the Soc.*

1 *Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004) (“[A]n ALJ may discredit
2 treating physicians’ opinions that are conclusory, brief, and unsupported by the
3 record as a whole . . . or by objective medical findings.”). Here, the ALJ pointed to
4 specific evidence conflicting with Dr. Goshike’s opinion that Plaintiff could only
5 sit for 3 hours and stand for 3 hours during an 8-hour work day, to support her
6 decision to give little weight to Dr. Goshike’s opinion.

7 In reviewing the record as a whole, the Court finds that the ALJ proffered
8 legitimate clear and convincing reasons supported by substantial evidence in
9 limiting Dr. Goshike’s opinions. *See Bayliss*, 427 F.3d at 1216; *Magallanes*, 881
10 F.2d at 750 (citation omitted) (stating that where there is “more than one rational
11 interpretation,” courts are required to uphold an ALJ’s decision). Accordingly, and
12 given that the ALJ is charged with resolving conflicts or ambiguities in medical
13 testimony, the Court finds that the ALJ did not err given the legitimate clear and
14 convincing reasons expressed.

15 ***c. Mark Maiocco, M.D. and Sarah Garrison, ARNP***

16 Plaintiff next argues that the ALJ erred by failing to consider the opinions of
17 treating physician, Dr. Mark Maiocco, and examining provider, Sarah Garrison,
18 ARNP. ECF No. 15 at 12. Defendant responds that the ALJ need not consider
19 either opinion because Dr. Maiocco’s and Ms. Garrison’s findings occurred well
20 after the date Plaintiff was last insured, December 31, 2011. ECF No. 16 at 13.

1 “[M]edical reports are inevitably rendered retrospectively and should not be
2 disregarded solely on that basis.” *Smith v. Bowen*, 849 F.2d 1222, 1225 (9th Cir.
3 1988). That is, even if several years have passed between the date last insured and
4 the date of the examination, a medical opinion or evaluation may be relevant “to an
5 evaluation of the pre-expiration condition.” *Id.* Notwithstanding, a retrospective
6 opinion may be discredited if it is inconsistent with, or unsubstantiated by, medical
7 evidence from the period of claimed disability. *Johnson v. Shalala*, 60 F.3d 1428,
8 1433 (9th Cir. 1995).

9 Dr. Maiocco diagnosed chronic fibromyalgia and other conditions, opined
10 that the debilitating limitations existed since at least August 2013. Tr. 420-21. Dr.
11 Maiocco opined that Plaintiff’s “severe” chronic back pain necessitated Plaintiff
12 having to lie down for one hour three times per day. Tr. 421. Dr. Maiocco also
13 opined that Plaintiff would likely miss more than four days of work per month and
14 rated his prognosis as “poor.” *Id.* Similarly, Ms. Garrison opined in December
15 2012, that Plaintiff’s DDD impairment is “marked” affecting his ability to stand,
16 walk, lift, carry, handle, push, pull, reach, stoop, or crouch. *See* Tr. 413. Ms.
17 Garrison opined that Plaintiff was capable of performing sedentary work in a
18 regular, predictable manner despite impairment. *See* Tr. 413-14.

19 Defendant argues that the ALJ need not discuss the opinions because both
20 were rendered after Plaintiff’s date last insured. ECF No. 16 at 13-14. The Court

1 agrees. Any error in failing to discuss Dr. Maiocco's later opinion is harmless
2 because the ALJ discussed and discounted Dr. Goshike's opinion, Plaintiff's
3 treating doctor, using contemporaneous examinations and records. Further Ms.
4 Garrison's opinion that Plaintiff could perform sedentary work is consistent with
5 the ALJ's findings regarding alternative work. No error has been shown.

6 **d. *Wayne Hurley, M.D.***

7 Plaintiff argues that the ALJ gave too much weight to non-examining state
8 medical expert Dr. Wayne Hurley. ECF No. 15 at 14 (citing Tr. 27-28). Plaintiff
9 explains that the ALJ accorded "some weight," which "was not in keeping with the
10 SSA's rules." *Id.*

11 Where an ALJ does not set forth specific, legitimate reasons for crediting
12 one medical opinion over another, he errs. *See Nguyen v. Chater*, 100 F.3d 1462,
13 1464 (9th Cir. 1996). If a non-examining medical expert's opinion is contrary to a
14 treating medical expert opinion, an ALJ may accord more weight when it is
15 consistent with other independent evidence in the record. *Tonapetyan*, 242 F.3d at
16 1149 (citation omitted).

17 Here, the ALJ explained that she accorded "some weight" to Dr. Hurley's
18 opinion because it is "consistent with objective and physical exam findings" as
19 well as Plaintiff's "activities of daily living." Tr. 27-28. The Court finds that the
20

1 ALJ set forth adequate specific, legitimate reasons for according Dr. Hurley's
2 opinion some weight.

3 **D. Assessment of Plaintiff's Fibromyalgia and Hepatitis C**

4 Plaintiff faults the ALJ for failing to classify his fibromyalgia and hepatitis
5 C as severe. ECF No. 15 at 8-9. In turn, Plaintiff argues that the ALJ failed to
6 factor those limitations in the RFC analysis, which would have limited Plaintiff to
7 less than sedentary work and required a disability finding. *Id.* at 9.

8 Step-two of the evaluation process requires the ALJ to determine if the
9 claimant has a severe medically determinable physical or mental impairment or a
10 combination of impairments that is severe. 20 C.F.R. § 416.920(a)(4)(ii). An
11 impairment is "not severe" if "it does not significantly limit [the claimant's]
12 physical ability to do basic work activities," such as "walking, standing, sitting,
13 lifting, pushing, pulling, reaching, carrying or handling." *Smolen v. Chater*, 80
14 F.3d 1273, 1290 (9th Cir. 1996).

15 Generally, "the step two inquiry is merely a *de minimis* screening device to
16 dispose of groundless claims," *id.*; as a result, the ALJ's failure to classify an
17 impairment as severe is harmless if the ALJ proceeds with the evaluation process
18 and considers both severe and non-severe impairments when formulating the RFC.

19 Here, at step two, the ALJ found Plaintiff had several severe impairments;
20 however, the ALJ found Plaintiff's possible fibromyalgia is a non-severe

1 impairment and that there is no evidence that hepatitis C caused more than a
2 minimal functional limitation. Tr. 24.

3 **a. *Hepatitis C Assessment***

4 The ALJ acknowledged Plaintiff's hepatitis C diagnosis, but found at step
5 two that there is "no evidence that hepatitis C caused more than minimal functional
6 limitation." Tr. 24. The ALJ noted that Plaintiff's "ongoing use of marijuana has
7 caused his [hepatitis C] treatment to be deferred." *Id.* (citing Tr. 349).

8 Plaintiff argues that the record contains evidence refuting the ALJ's finding.
9 ECF No. 15 at 9. Specifically, Plaintiff argues that Dr. Goshike attributed
10 Plaintiff's multiple joint pains to hepatitis C. *Id.* (citing Tr. 288). Dr. Goshike
11 found that Plaintiff's hepatitis C is "likely causing multiple joint pains." Tr. 288.
12 However, she did not opine that the pains caused more than a minimal functional
13 limitation and the ALJ properly credited her opinion little weight. *See id.* Rather,
14 Dr. Goshike notes that his pain is "tolerable" and Plaintiff "feels better than
15 before." *Id.*

16 Next, Plaintiff argues that Dr. Figueroa determined that his "hepatitis C
17 w[ith] body aches" is severe reflecting an "[i]nability to perform one or more basic
18 work-related activities" of sitting, standing, walking, lifting, handling, and
19 carrying. ECF No. 15 at 9 (citing Tr. 336, 339). The ALJ found that Dr.
20 Figueroa's opinion is inconsistent with objective and physical exam findings,

1 noting 5/5 strength of the upper extremities, 4/5 strength of the lower extremities,
2 and normal gait and station. *Id.* Accordingly, the Court affirms the ALJ's step two
3 conclusion that Plaintiff's Hepatitis C was not severe. Furthermore, given the
4 ALJ's alternative sedentary work findings, no harmful error has been shown.

5 **b. *Fibromyalgia Assessment***

6 The ALJ based her fibromyalgia finding, in part, on a lack of ongoing
7 overall body complaints and treatment. Tr. 24. The ALJ also reasoned that
8 although Deepika Goshike, M.D. noted that a 14/18 trigger point exam finding was
9 suggestive of fibromyalgia in February 2010, *see* Tr. 24 (citing Tr. 292-93), the
10 following month Dr. Goshike noted that an ESR "was actually within normal
11 limits," *see id.*; Tr. 291. The ALJ alternatively found that even if fibromyalgia is
12 established, "it is a non-severe impairment." Tr. 24

13 Plaintiff argues that the ALJ failed to consider that he was seen numerous
14 times for his chronic pain, later diagnosed with fibromyalgia, and that he
15 constantly reported multiple body aches. ECF No. 15 at 8 (citing Tr. 292, 279); 17
16 at 8 (citing Tr. 339). Plaintiff also argues that he was prescribed medications for
17 treating his fibromyalgia. *Id.* (citing Tr. 288). Plaintiff argues that the ALJ
18 ignored that after his last date of insured, in May and July 2012, he had 16/18
19 positive trigger points. *Id.* at 8-9. Plaintiff contends the ALJ erred by finding this
20 to be a non-severe impairment. The crux of Plaintiff's argument must be that he is

1 more impaired than the ALJ found. But, as discussed above, the evidence does not
2 support a greater effect on Plaintiff's ability to work.

3 Given the ALJ's alternative findings—findings suggestive of fibromyalgia,
4 and even if fibromyalgia is established, it is a non-severe impairment—no harmful
5 error has been shown.

6 **ACCORDINGLY, IT IS HEREBY ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment (ECF No. 13) is **DENIED**.

8 2. Defendant's Motion for Summary Judgment (ECF No. 16) is

9 **GRANTED.**

10 The District Court Executive is directed to file this Order, enter Judgment
11 for Defendant, provide copies to counsel, and **CLOSE** this file.

12 **DATED** April 12, 2017.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

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THOMAS O. RICE
Chief United States District Judge